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No. 85-1097

In the

Supreme Court of the United States

October Term, 1985

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Cross-Respondents,

– against –

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Cross-Petitioners.

BRIEF IN OPPOSITION TO A CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

The issues that the pension plan cross-petitioners seek to raise involve the standard of proof that the pension plan was required to present in connection with its claim that the pension plan amendments were adopted on the basis of "financial necessity". (Cross-Petition, p. 11.) However, the pension plan's evidence on the financial issue failed on a much more prosaic basis than is set forth in the Cross-Petition.

The District Court's decision was predicated on findings that the testimony of Robert J. Lowen, the President of the M.M.&P. union, and the only witness that the pension plan presented on the subject, was not worthy of belief.

The District Court stated (B-13):*

> "Captain Lowen, Union President, on being deposed by plaintiff's counsel before trial, stated that he did not recollect the August 24, 1976 meeting of the trustees – the date Amendments 46 and 47 were adopted. (Lowen Dep. PP 194). He did not recall Bernard Epstein's review of the definition of retirement with the Joint Committee of Trustees at the August, 1976 meeting and did not recall what amendments Epstein had prepared. He did recall Amendments 46 and 47 from just having seen them. *Id.* 196-197. He did not recall having discussed the Amendments with Epstein before the meeting and had only a vague recollection of the meeting when the Amendments were discussed. *Id.* 198.
>
> "Nonetheless, at trial on questioning by counsel for the plan Lowen launched into a long and extensive dissertation on the reasoning behind the amendments and the need to protect the integrity of the fund. It is clear that at the pretrial deposition Lowen deliberately frustrated plaintiff's right to discovery. Accordingly, his testimony concerning the basis for these amendments is striken and will not be considered by the court. F.R.Civ.P. 37."

This trial ruling obviously was within the discretion of the District Court, and presents no issue that warrants Supreme Court review.

Further, the findings of the District Court as affirmed by the Court of Appeals establish that the underlying motivation of the pension plan trustees was not financial; their motivation was to drive older employees out of the work force, in favor of "new young blood," by imposing an even "harsher penalty" upon those who, like Captain Chambless, opted to work in competitive employment when confronted by the humiliation of a "Hobson's choice" involving either demotion to entry-level positions or the forced abandonment of their careers in the guise of what is euphemistically called "retirement." (B-10-12)

Thus, the findings of the District Court establish that the motive of the pension plan trustees was not financial, but to establish a penalty for engaging in competitive employment. (B-10)

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* Citations with letter prefixes are to pages in the Appendix.

The existence of such a punitive motive is incompatible with the fiduciary duties of the pension plan trustees and inconsistent with the established principle that no forfeiture of benefits can be exacted for competing with an employer. *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980).

CONCLUSION

There is no factual predicate for the issues which the pension plan trustees seek to raise in their Cross-Petition.

January 23, 1986

Respectfully submitted.

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